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IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 75

AMERICAN DISTRICT TELEGRAPH COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court
for the District of Rhode Island

JURISDICTIONAL STATEMENT OF APPELLANT AMERICAN DISTRICT TELEGRAPH COMPANY

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	4
STATEMENT	5
THE QUESTIONS ARE SUBSTANTIAL	10
CONCLUSION	43
APPENDIX A	
Findings of Fact, Conclusions of Law, and Opinions of Wyzanski, D. J.	1a
APPENDIX B	
Final Decree	35a

TABLE OF AUTHORITIES

PAGE

Cases:

American Tobacco Co. v. United States, 328 U. S. 781 (1946) 11

Brown Shoe Co., Inc. v. United States, 370 U. S. 294 (1962) 2

Crown Zellerbach Corporation v. FTC, 296 F. 2d 800 (9th Cir. 1961), cert. denied, 370 U. S. 937 (1962) 29

Hartford-Empire Co. v. United States, 323 U. S. 386 (1945) 41

Morrison v. California, 291 U. S. 82 (1934) 15

N. L. R. B. v. Express Publishing Co., 312 U. S. 426 (1941) 40

Schine Chain Theatres, Inc. v. United States, 334 U. S. 110 (1948) 32, 39

Swift & Company v. United States, 196 U. S. 375 (1905) 39

Tot v. United States, 319 U. S. 463 (1943) 15

United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945) 11, 12

United States v. Bethlehem Steel Corporation, 168 F. Supp. 576 (S. D. N. Y. 1958) 29

United States v. Diebold, Inc., 369 U. S. 654 (1962) 2

United States v. E. I. duPont deNemours & Co., 351 U. S. 377 (1956) ..... *passim*

United States v. E. I. duPont deNemours & Co., 353 U. S. 586 (1957) 2

PAGE

United States v. First National Pictures, Inc., 51 F. 2d 552 (S. D. N. Y. 1931) 40
United States v. Gainey, —— U. S. ——, 33 U. S. Law Week 4200 (3/1/65) 15
United States v. Griffith, 334 U. S. 100 (1948) 11, 32
United States v. Loew's, Inc., 371 U. S. 38 (1962) 2
United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), aff'd per curiam, 347 U. S. 521 (1954) 11, 23

Other Authorities:

Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U. S. C. §§1, 2, 4 ..... *passim*

Expediting Act of February 11, 1903, c. 544, 32 Stat. 823, as amended, 15 U. S. C. §29 2

Federal Rules of Civil Procedure, Rule 65(d) 39, 41

Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) 11

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Jurisdictional Statement

Appellant American District Telegraph Company ("ADT") appeals from a judgment of the United States District Court for the District of Rhode Island (Hon. Charles E. Wyzanski, Jr., United States District Judge for the District of Massachusetts, sitting by special designation). This statement is submitted in compliance with paragraph 2 of Rule 13 to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below

The District Court's findings of fact, conclusions of law, and opinions on liability and remedy (App. A, *infra*) are reported at 236 F. Supp. 244 and 1964 Trade Cases ¶71,298.

Jurisdiction

This civil antitrust suit, in which the Government sought injunctive relief against ADT and other defendants for alleged violation of Sections 1 and 2 of the Sherman Act, was instituted under Section 4 of that Act (Act of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U. S. C. §4).

The judgment of the District Court (App. B., *infra*) was dated and entered on November 27, 1964. ADT's notice of appeal was filed in that court on January 26, 1965. Mr. Justice Goldberg, by an order dated March 23, 1965, extended the time of all defendants for docketing the case and filing the record to and including April 19, 1965.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Section 2 of the Expediting Act of February 11, 1903, c. 544, 32 Stat. 823, as amended, 15 U. S. C. §29. Many cases, including the following, sustain jurisdiction: *Brown Shoe Co., Inc.* v. *United States,* 370 U. S. 294 (1962); *United States* v. *E. I. duPont deNemours & Co.,* 353 U. S. 586 (1957); *United States* v. *Diebold, Inc.,* 369 U. S. 654 (1962); *United States* v. *Loew's, Inc.,* 371 U. S. 38 (1962).

Questions Presented

The ultimate questions presented are:

Whether, upon the record in this case, the District Court erred in concluding that ADT, with the other defendants, ADT's parent and its other subsidiaries, violated and continues to violate Sections 1 and 2 of the Sherman Act.

Whether, upon the record in this case, the District Court's creation of presumptions of illegality and its overall conduct of the proceedings below so departed from governing judicial standards as to deprive defendants of a fair trial, denying to ADT its right under the Fifth Amendment to the Constitution of the United States not to be deprived of liberty or property without due process of law.

Within these ultimate questions there lies a broad range of subsidiary questions, including, *inter alia*, the following:

1. Did the District Court err when, inferring that defendants had "monopoly power" solely upon the basis of stated percentages of a Government-defined "relevant market," following trial it expressly shifted to defendants the burden of proving that they had *not* monopolized, had *not* attempted to monopolize, had *not* engaged in restraints of trade, and therefore had *not* violated Sections 1 and 2 of the Sherman Act?

2. Did the District Court err in finding asserted "monopoly power" based upon (a) an artificially narrow product or service definition of the "relevant market", adopted

upon the assumption that the criteria established by this Court in *Cellophane*[1] are no longer controlling, (b) exclusion from the total market of other concerns' revenue identical in source to revenue of defendants included in determining their asserted market share, and (c) the conclusion that the geographic limits of the market were national rather than local?

3. Were the District Court's findings of fact and ultimate conclusions based thereon clearly erroneous?

4. Did the District Court err in (a) entering a decree, in statutory terms, enjoining defendants "from further restraining trade, or attempting or combining to restrain trade * * * and * * * attempting to monopolize, or conspiring to monopolize, or monopolizing that designated market," and (b) prohibiting ADT from employing in any capacity a non-defendant individual who is Chairman of ADT's Board of Directors?

Statutes Involved

Sections 1 and 2 of the Sherman Act, c. 647, 26 Stat. 209, as amended, 15 U. S. C. §§1, 2 provide in pertinent part:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * *

1. *United States* v. *E. I. duPont deNemours & Co.*, 351 U. S. 377 (1956).

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *"

Statement

This direct appeal is from a final judgment of the District Court granting in part and denying in part relief sought by the Government in a civil antitrust suit against ADT, Grinnell Corporation ("Grinnell"), Holmes Electric Protective Company ("Holmes") and Automatic Fire Alarm Company of Delaware ("AFA").

The Parties and Their Businesses. ADT has long been engaged in furnishing a variety of electric protection services designed to assist customers or subscribers in protecting against such hazards as fire, waterflow and burglary. Until 1953, ADT was a subsidiary of Western Union Company, furnishing its services to local subscribers from various Western Union offices around the country. Among ADT's services is central station protection service ("CSPS"), both insurance-accredited and non-accredited.

Other than fire, waterflow and burglary protection, CSPS, as rendered by ADT and others, also includes industrial process supervisory service, heating or temperature control supervisory service, watchmen's reporting service, and watchmen's security service. CSPS involves the use at subscriber's premises of devices designed to detect or react to these various hazards, environmental conditions, or industrial operations, each of which requires different

devices (*e.g.*, fire and waterflow detection devices are totally different from those for burglary detection). Each of these different kinds of devices is connected to separate transmitters and circuits or wires (*e.g.*, a fire or burglary wire) leased from a local telephone company and running to a central station away from the subscriber's premises. Signal-receiving equipment is maintained at the central station, where alarms transmitted from the subscribers' premises are recorded. Depending upon the type of service, the central station reacts by relaying alarms to the local fire or police departments, dispatching employees to the subscriber's premises or otherwise responding to the signal received (FF[2] 2-4, 8a-9a).

Various independent insurance rating agencies afford "accreditation" or approval to central stations which comply with various standards established by those agencies. A subscriber served by such approved central stations may qualify for the insurance premium discounts available in connection with CSPS if, ***but only if***, the subscriber elects to comply with the rating agencies' additional standards as to the number, placement and types of devices used at its premises; the installation, ownership, maintenance, inspection and testing of those devices by the accredited central station; and other criteria. To illustrate, a subscriber interested in the maximum insurance discount in connection with burglary CSPS must use an accredited central station and must have his own premises, the devices

2. Throughout this statement "FF" and "CL" references are to the District Court's findings of fact and conclusions of law, and "OL" and "OR" references are to paragraphs of the court's opinions on liability and remedy, respectively. "Tr." references are to the trial transcript and all other record citations are to exhibits as designated before the District Court. Unless otherwise noted, emphasis in quoted passages has been supplied.

there, and their maintenance approved or "certificated" by a rating agency. (See, *e.g.*, FF 5, 9a; GX 337 (pp. 42-44).)

Holmes has long been engaged in the CSPS *burglar* alarm business. AFA has long been engaged in the CSPS *fire and waterflow* alarm business. In 1961 ADT operated central stations in 115 cities located in 35 states and the District of Columbia (in a number of those cities it had no accredited CSPS competition). Ten of these stations are still operated in Western Union offices. Holmes operated central stations in New York City, Philadelphia and Pittsburgh (it had accredited burglar CSPS competition in each of those cities). AFA operated central stations in Boston, New York City and Philadelphia (and it had accredited fire and waterflow CSPS competition in each of those cities) (FF 7-9, 10a).

Grinnell has never been engaged in rendering any kind of central station protection service. Its business is, and has been, the manufacture and sale of a variety of metal products.[3] Formerly Grinnell manufactured and owned certain of the detection devices used by ADT [4] in connection

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3. Piping, fittings, valves and other construction supplies (71% of total revenues); sprinkler systems and other fire-fighting equipment (18%); industrial piping (8%); and humidification products and cast and malleable iron job work castings (3%). (Tr. 689-90).

4. The statements in the District Court's findings (FF 15, 17-18) to the effect that Grinnell has continued to manufacture and supply equipment or devices used by ADT, AFA and Holmes are "clearly erroneous", as we believe the Government concedes. More than ten years ago, Grinnell began to phase out, and prior to trial had ceased, the manufacture of all such items. (Tr. 690-93, 711-12, 714-15, 720-23; GX 80; GX 87; GX 111-112; GX 276).

with sprinkler systems on subscribers' premises.[5] In 1949, Grinnell purchased 51% of the stock of AFA, thereafter increasing its holdings to 89%. Grinnell acquired 100% of the stock of Holmes in 1950 (GRJ 2). In 1953, after advising the Department of Justice, Grinnell, without objection, acquired from Western Union 62% of ADT's stock and by the time of trial had increased its holdings to 76% (GRJ 5; GRJ 50; GRJ 52-53; GRJ 55-56; GRJ 76).

The Complaint. The Government's complaint, filed April 13, 1961, alleged that these four defendant companies had violated Sections 1 and 2 of the Sherman Act by combining and conspiring to restrain and monopolize trade *solely* in the insurance-accredited segment of the central station electric protection service business. More specifically, the complaint alleged an over-all, unitary and continuing combination and conspiracy to divide types and areas of service, to acquire accredited CSPS firms, to preclude entry of competition into that business, and to engage in predatory pricing to destroy such competition (Compl., pars. 8, 25-27).

The Decision Below. The District Court concluded that defendants had violated Sections 1 and 2 of the Sherman Act in that ADT, AFA and Holmes, "during their growing period," had in 1907 and earlier entered into written agreements, now lapsed and legally no longer effective, which allocated geographic markets and classes of customers; that thereafter the defendants "had continued adherence to the patterns formed in violation of law"; that as a

5. These devices, used for sprinkler supervisory and waterflow alarm CSPS service ("SS & WFA"), are designed to detect and signal the operation of, or malfunctions in, a sprinkler system.

"monopolistic combination" the alarm company defendants had restrained trade *in violation of Section 1* in that they "manipulated their own prices to forestall competition"; that these restraints of trade were a chief avenue by which they attempted to monopolize, conspired to monopolize, and did monopolize the asserted "national market in the accredited CSPS industry"; that "perhaps even more effective" as a means to monopolization were their "acquisitions of *competing* companies"; and that Grinnell's acquisitions of ADT, AFA and Holmes stock and "direction of the policies [of those companies] as a whole toward the maintenance of the monopolization constituted a violation of Section 2" (CL 1-7, 26a-27a).

The District Court entered a decree (35a-37a) which requires Grinnell to divest itself of the stock of the defendant alarm companies; enjoins all defendants from making any acquisitions of concerns engaged in the accredited CSPS business; imposes specified controls upon the pricing and competitive activities of the alarm company defendants; and expressly asserts the court's continuing jurisdiction for the purposes of "correction, construction or execution" of the decree.

Further, the decree enjoined all defendants from "restraining trade, or attempting or combining to restrain trade in [the national market of insurance-accredited central station protective service] and from further attempting to monopolize, or conspiring to monopolize, or monopolizing that designated market." The court also enjoined any defendant from employing one James Douglas Fleming as officer, director, employee, consultant, agent or otherwise after April 1, 1966.

The Questions are Substantial.

Throughout the trial of this suit and in its decision, the District Court invited plenary appellate review. Repeatedly the court voiced its expectation of review by this Court and its anticipation that existing precedents would be discarded.[6] And its unprecedented rulings were on issues of vital moment, involving paramount importance not just for this litigation but for the interest of the general public in having clear warning as to the application of antitrust laws with criminal sanctions. Significant questions as to the scope of the Sherman Act, fundamental principles of due process of law, and the continued vitality of this Court's prior decisions are manifestly present here.

1. Until the decision below, it has been unquestioned that even in antitrust cases the plaintiff has the burden of proof. Actions under Section 2 of the Sherman Act have been no exception: "The burden of proof, of course, was upon the Government to establish monopoly." *United States* v. *E. I. duPont deNemours & Co.*, 351 U. S. 377, 381 (1956). The offense of monopolization has required proof of monopoly power—the power to control prices or to ex-

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6. For example, at one point Judge Wyzanski stated, "* * * all I have been trying to do in this proceeding is to stay within what I understand to be now prevailing views or those *likely to be prevailing by the time this case gets to a higher court*, if it gets there." (Tr. 235) And again, the court said, "* * * [I]t is worthwhile to have the record full enough so that if the Supreme Court does not take the view I think they are going to take they will have before them a complete record and not merely a proffer of evidence" (Tr. 176; see also, *e.g.*, Tr. 130-31, 137-41, 144-45, 166, 171-72, 174-77, 260-61, 267-68, 444-45; 6a-7a).

clude competitors in the relevant market.[7] But even upon such proof, a finding of violation of Section 2 has required further that the plaintiff carry the burden of proving additional facts. Thus, monopoly power has been deemed illegal (*i.e.*, prohibited "monopolization") only when, for example, such power (1) was unlawfully acquired, maintained or expanded by restraints of trade in violation of Section 1 or (2) was unlawfully obtained or exercised by acts of such effect as to connote exclusionary purpose (even though those acts might be "honestly industrial" and not in and of themselves illegal restraints of trade).[8] In sum, because monopoly power can be "thrust upon" a defendant, the

7. *United States* v. *E. I. duPont deNemours & Co.*, 351 U. S. 377 (1956); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954).

8. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945); *United States* v. *Griffith*, 334 U. S. 100 (1948); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954); *American Tobacco Co.* v. *United States*, 328 U. S. 781 (1946). In *United States* v. *E. I. duPont deNemours & Co.*, 351 U. S. 377, 390 (1956), this Court noted that, "Senator Hoar, in discussing §2, pointed out that monopoly involved something more than extraordinary commercial success, 'that it involved something like the use of means which made it impossible for other persons to engage in fair competition." Elsewhere these principles have been alluded to as follows: "Monopolizing under Section 2 consists of monopoly in the economic sense—that is, power to fix prices or to exclude competition—plus a carefully limited ingredient of purpose to use or preserve such power. Economic monopoly becomes illegal monopolization not only (1) if it was achieved or preserved by conduct violating Section 1 but also (2) if it was, even by restrictions not prohibited by Section 1, deliberately obtained or maintained. This element of 'deliberateness' or 'purpose', distinguishing economic monopoly from the offenses of monopolization, differs from the more demanding concept of 'specific intent' relevant where the offense is an attempt to monopolize." Report, Att'y Gen. Nat. Com. to Study the Antitrust Laws, 43 (1955).

cases have recognized that a plaintiff must sustain not only the burden of proving "monopoly—lawful or unlawful, as the case might be'"[9]—but also the burden of proving "monopolization."

Here, however, after trial and without prior warning, the District Court expressly shifted this burden from the Government to the defendants, stating in its decision:

> "* * * [M]ost of the cognoscenti have expected that a day would come when the Supreme Court would announce that where one or more persons acting jointly had acquired so clear a dominance in a market as to have the power to exclude competition therefrom, there was a *rebuttable presumption that such power had been criminally acquired* and was a monopolizing punishable under §2." (6a)

Thus assuming that this Court would change its position and the existing law on an issue so fundamental not only to antitrust law but, indeed, to the broader concepts of due process of law, the court below continued:

> "* * * To this Court it appears that the day has come for it, and more important for counsel, to proceed on the knowledged principle that once the Government has borne the burden of proving what is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and *has monopolized in violation of §2.*" (7a)

The District Court, however, went even further, making clear not only that it was in fact shifting the burden of

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9. "It does not follow because 'Alcoa' had such a monopoly, that it 'monopolized'. * * *" *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 425, 429 (2d Cir. 1945).

proof but also that the burden thus shifted was to disprove antitrust offenses other than just monopolization in violation of Section 2 of the Sherman Act:

> "*Such a shifting of the burden not merely of going forward, but of proof,* such a rebuttable presumption rests on the by-now dozens of court records which make it quite clear that it is the highly exceptional case, a *rara avis* more often found in academic groves than in the thickets of business, where monopoly power was thrust upon an enterprise by the economic character of the industry and by what Judge L. Hand in *Aluminum* called 'superior skill, foresight and industry.' More than 7 decades of Sherman Act enforcement leave the informed observer with the abiding conviction that durable non-statutory *monopolies* (ones created without patents or licenses or lasting beyond their term) *are, to a moral certainty, due to acquisitions of competitors or restraints of trade prohibited by §1.*" (6a-7a)

Proceeding still further, the court below concluded that a mere finding of monopoly power, inferred from dominant market share alone, would also shift to defendants the burden of proving that they had not attempted to monopolize in violation of Section 2:

> "Defendants, faced with proof of overwhelming share of the accredited CSPS business in the hands of the alarm company defendants, have offered no evidence to rebut the *presumption that this share was the result of an attempt to monopolize.* * * *" (FF 48, 21a)

The court below thus expressly conceded it was "shifting the burden of proof" and creating "*rebuttable* presumptions". In fact, however, the trial judge's stated conviction that monopoly power is "*to a moral certainty,* due

to acquisitions of competitors or restraints of trade prohibited by §1" wholly belies the implication that defendants, once found to have monopoly power, could in any circumstances have persuaded the court below that they were innocent of criminal conduct. Thus the District Court was prepared to go even beyond shifting the burden of proof, establishing instead an *irrebuttable* presumption. The court simply fashioned a new *per se* category of multiple antitrust violations—violations inevitably to be found upon a showing of nothing more than "the relevant market and how predominant a share of that market defendant has."

Even if the trial judge's mind had not thus been irrevocably set as to the universal illegality of monopoly power and if the presumptions he erected were in fact truly rebuttable, the revolution in both substantive and evidentiary law wrought by the District Court is manifest. Here, after trial, the defendants have been told for the first time that they had the burden, in a case involving facts dating back as much as 60 years, of "proving a negative" as to not one but several alleged violations of criminal statutes. In addition to unlawful monopolization, the court below has concluded as a matter of law—upon the basis of its newly fashioned presumptions—that the alarm company defendants have unlawfully attempted to monopolize, have conspired to monopolize, and have engaged in *per se* violations of Sherman Section 1.

The impact of this unprecedented judicial topsy-turvy is highlighted by the total failure of the lower court to make any findings of fact concerning agreements or acts

in combination—other than as to agreements between some of the defendants dating back to 1907 and earlier (agreements found to have lapsed and to be no longer legally effective)—to support its conclusions of law that defendants "resorted to restraints of trade prohibited by Section 1 of the Sherman Act". (FF 48-55, 21a-26a; CL 1-6, 26a-27a)

Although the existence of monopoly power, by itself, has never been sufficient to constitute a violation of any statute, the lower court has here created a legislative presumption that such power inevitably is "criminally acquired"—a presumption not of one offense but of several proscribed by more than one statute and invoked upon the basis of a mere showing of "the relevant market and how predominant a share of that market defendant has." The law has been clear that monopoly power, even apart from regulated public utilities, can exist without unlawful origin, maintenance or use. To establish a criminal presumption to the contrary, as the court below did, is without basis and at best can be essayed only by Congress. *Cf. United States* v. *Gainey,* —— U. S. ——, 33 U. S. Law Week 4200 (3/1/65); *Tot* v. *United States,* 319 U. S. 463 (1943); *Morrison* v. *California,* 291 U. S. 82 (1934).

To avoid repetition, ADT will not here reiterate arguments contained in the jurisdictional statements of the other defendants dealing with the trial court's over-all conduct of the proceeding below, connoting prejudgment and denial of the fair trial essential to due process of law. If probable jurisdiction is noted, however, ADT will ask for review of these questions in the event this Court is not satisfied that the complaint should be dismissed for failure of proof, as outlined hereafter.

Appellant submits that the District Court's judicial creation of criminal presumptions shifting to defendants the multi-phased burden of proof it spelled out here, as well as its conduct of the proceedings, clearly raises substantial questions of law of such vital moment to the application of the antitrust statutes and the preservation of due process of law as to necessitate plenary review by this Court.

2. The District Court's application of improper legal tests and its clearly erroneous findings in connection with its conclusion that the defendants have the monopoly power essential to a finding of monopolization also compel reversal of the judgment below. The court's determination of monopoly power, inferred solely from invalid percentages of a "relevant market" erroneously defined, is suspect even upon a quick reading of its own findings (understated in comparison with the evidence) that defendants lack the requisite power to control price or exclude competitors:

> "[T]here is no persuasive evidence that any particular prospective entrant has been unable to begin operations, or that any specific CSPS firm has failed or been driven out of business. * * *
>
> "Defendant alarm companies do not have unfettered power to control the price of their services. Even where they have no competition from other CSPS companies, they have not always been able to receive the standard they have set for themselves, the so-called 'Minimum Basic Rates,' * * * This is due to the fringe competition of other alarm or watchmen services." (FF 45-46, 20a-21a)

Upon examination of the record, it is manifest how the court below erred in finding monopoly power in the face of such facts contradictory of the classic indicia of such power. Indeed, even though defendants were not advised prior to the District Court's entry of judgment that the burden of proof had been shifted to them, the evidence strongly implies that their position (measured by the court in terms of total national revenue of accredited CSPS concerns) has been "thrust upon" them.

The alarm company defendants, among the first to offer central station protection starting with the late 1800's, were the pioneers of these new services. The nature of the business is such that even the Government concedes the fact that minimum bases of subscriber revenue (*e.g.*, at least $125,000 annually) derived within a maximum operational area of not more than 25 miles' radius are essential to sustain an accredited central station. Consequently, many localities are necessarily "natural monopoly" areas. Moreover, defendants' position as measured by the District Court is substantially attributable to the fact that ADT (with its early start in the CSPS business and its former affiliation with the nationwide Western Union system) operates central stations in more than 100 cities, many of which offer insufficient revenue to sustain a competing central station. While these facts strongly indicate that the accredited CSPS business would be expected to produce a markedly different competitive structure than that of other enterprises, significantly the number of accredited central station concerns (excluding defendants) has increased more than fivefold since 1945.

Against this preliminary factual background, we turn to the District Court's erroneous determination of the "rele-

vant market" and defendants' purported share—the sole basis for the court's inference of monopoly power.

(a) *The Product Market.* Throughout the trial counsel were admonished that the precepts set forth by this Court in the landmark *Cellophane* case[10] were considered by the District Court no longer to be controlling. For example, the court stated:

> "You are really trying to argue, if I understand you correctly, the same kind of thesis which was unsuccessfully [*sic*] argued in the duPont Cellophane case, * * * I just don't think there is anything to that as a matter of law. * * * I think the notion that the defendants have that cross-elasticity of demand, such as in the case of cellophane cigar wrappers, went out of the effective vocabulary of antitrust defendants, [and] is also an aberration. * * * I am quite sure that in the long run the Supreme Court of the United States is going to take about as narrow a view of the market as the circumstances here permit."[11] (Tr. 171, 444-45)

The District Court, instead, substituted its view of Clayton Act market definitions for mergers as enunciated in "recent Supreme Court cases," and wholly disregarded the evidence of record pertinent to application of the controlling criteria of *Cellophane.*

The court below uncritically adopted precisely the same unrealistic and artificially narrow relevant market definition alleged by the Government, *i.e.*, the business of central

10. *United States* v. *E. I. duPont deNemours & Co.*, 351 U. S. 377 (1956).

11. See also, *e.g.*, Tr. 152-53, 160, 174-77, 215, 235, 267-68, 534-36, 671-73.

stations "accredited for such service by insurance inspecting and rating organizations"[12] (Compl. par. 8; FF 43, 19a-20a). In doing so, it is immediately apparent that the court failed to distinguish among fire and waterflow, burglary, industrial process supervisory, heating supervisory and the other forms of service afforded by central stations. All were "lumped together" without explanation, even though meaningful market definition would patently require recognition of such facts as the different equipment, end uses and prices of each of these unrelated services.

Seemingly the only consideration given weight in thus forcing all these services into a single market mold was the fact of available insurance accreditation.[13] And yet the very agencies granting such accreditation recognize each service as separate and unrelated. For each service, they establish totally different standards and premium discount structures which are unaffected by an insured's subscribing to only one or to several accredited central station services. Moreover, the services are not offered in "packages"

12. Contrary to the court's gratuitous findings (FF 28-29, 16a), the defendants did not contend that the relevant market includes "all protective systems." Their contention was merely that the Government failed to carry its burden of proof, because the evidence and the facts of the market place established that insurance-accredited CSPS was, for Sherman Act purposes, only a part of some larger relevant market in which effective competition with other protective systems was the reality and the impact of such competition was material and significant. *Cf. Cellophane,* 351 U. S. at 394 ("The charge was monopolization of cellophane. The defense, that cellophane was merely a part of the relevant market for flexible packaging materials.")

13. If insurance accreditation were the determinative consideration, the relevant market would logically include a variety of non-central station protective systems, since insurance accreditation and premium discounts are not limited to approved CSPS. See fn. 24, *infra* at p. 26.

—rather each subscriber decides the particular service or services desired. In those cities able to sustain two or more central stations, a subscriber who desires several services typically employs more than one accredited CSPS concern.

The findings of the court clearly indicate that the District Judge made no careful analysis of the evidence, such as was meticulously undertaken by the trial court in *Cellophane* and endorsed as the proper legal test by this Court. The court below just was not interested in any inquiry as to whether the relevant market includes other protective services "reasonably interchangeable" with insurance-accredited CSPS in terms of end use, quality, and price. The wealth of evidence disproving the Government's market definition was either ignored or disposed of with a few facile, cryptic and erroneous generalizations.

The lower court's disregard for the precepts of *Cellophane* and its virtual waiver of the Government's burden of proof on the relevant market are easily seen upon comparison of even a few of its conclusions with the evidence and, indeed, with its own express findings. The court started with an understated concession that many other protection systems are available in cities where there are central stations and that

> "Business or other enterprises located in cities where there is CSPS have the option, of course, of using watchmen, watchdogs, automatic proprietary systems connected with some local police or fire station, often unaccredited CSPS, and often accredited CSPS." (FF 12, 11a)

Not only did the court fail to delineate the full panoply of electric systems, but also—having once conceded begrudgingly that those it did identify limit defendants' power to control price (FF 46-47, 20a-21a)—it omitted any meaningful discussion of the competitive interrelationship of those systems and accredited CSPS.

To illustrate, the record demonstrates that even if other "same end use" systems such as watchmen and watchdogs are excluded, insurance-accredited central station protective service is reasonably interchangeable with, and there is substantial cross-elasticity of demand for, numerous automatic, semi-automatic and manual electric hazard protection systems. This is true even though admittedly, as to a particular customer, each system may be deemed to have some peculiarities with consequent, but generally non-determinative, advantages and disadvantages (just as in the case of cellophane and other wrappings).

Not only do such other electric systems as proprietary, auxiliary, direct connected, telephone answering, local alarm and non-accredited central station protection serve the same end uses as accredited CSPS, but as to each such specific use (protection against fire, burglary and so on) they embody basically the same physical equipment and operating concepts. For each particular hazard the devices and the wiring placed in the protected premises are so identical as to be interchangeable from one system to another in practically all cases. Essentially the only distinguishable factor between these systems from the viewpoint of physical and operating analysis lies in the place where the

alarm signal is received.[14] These considerations, coupled with the quite modest investment necessary to equip a central station (approximately $55,000), underscore the fact that there is marked ease of entry into the central station business.[15] In fact, the accredited CSPS concerns of today have typically added such service to businesses founded upon these other related systems, sometimes switching established customers to accredited CSPS.

The significance of this identity of physical equipment and operating concepts between accredited CSPS and the other electric protection systems was heightened by the unchallenged evidence that most accredited CSPS companies, including the defendants, offer the other protection systems as well. Conceding these facts, while ignoring the identity of equipment and operation, the ease of entry, and the substantial interchangeability of systems, Judge Wy-

14. Proprietary system signals are received at a console or station on the protected premises; auxiliary and direct connected systems transmit signals directly to fire or police stations; local systems trigger alarms at the protected premises; and telephone answering and central station systems (whether or not insurance-accredited) receive alarm signals at points away from the protected premises, whence they are relayed to fire or police headquarters. (See, *e.g.*, Tr. 97, 94, 122-23, 396-402; Exs. W-8 (pp. 45-46), W-35 (pp. 5-6, 17), W-47 (p. 15), C-40, GX 319 (pp. 3-6, 14), GX 324 (p. 37), GX 336 (pp. 65-66), D-15, GX 339 (p. 4), GX 352 (pp. 50-52), GX 355 (pp. 24-25).)

15. For those CSPS concerns interested, there is no significant barrier to accreditation of a central station. In fact, excluding the defendants, the number of concerns with accredited central stations has increased from approximately 8 in 1945 to about 42 in 1964, and 30 of those concerns started their accredited CSPS businesses in cities where defendants were in competition with them. (Tr. 395-96, 496; Ex. D-75(b)) In the light of these unchallenged facts of record, the grudging character of the lower court's treatment of the evidence bearing upon the issue of monopoly power is shown by finding 45 (20a), in which appears the sole reference to this evidence ("* * * there is no persuasive evidence that any particular prospective entrant has been unable to begin operations. * * *").

zanski cryptically concluded that "this entry by one company into two or more adjacent markets has no substantial significance in defining either of those markets[16] (FF 14, 12a).

The record is replete with evidence bearing upon the *Cellophane*-prescribed inquiry as to customer recognition of and reliance upon interchangeability in systems and services.[17] The record, including the testimony of the bulk of the Government's own alarm company witnesses, shows marked cross-elasticity of demand. Establishments similar in business, inventories maintained, location and all other aspects significant to a choice of protective systems regularly make different elections as between central station (both accredited and non-accredited) services and the variety of non-central station systems.[18] The court below

16. In an earlier and much-cited monopolization case, however, he took a diametrically opposed view:

> "* * * To define a market in terms of what the [suppliers offer] does not involve circular reasoning. For the problem of defining a market turns on discovering patterns of trade which are followed in practice." *United States* v. *United Shoe Machinery Co.*, 110 F. Supp. 295, 303 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954).

17. The Government offered no testimony by users or economic data as to these issues. Defendants did offer user testimony and surveys, which, with the evidence from protective system firms and others, including the Government's witnesses, abundantly supported the fact of susbtantial interchangeability. (*E.g.*, Exs. W-36 (pp. 6-8), W-33 (pp. 2-5); Tr. 531-32, 556-59; and see next footnote.)

18. *E.g.*, Tr. 113, 116-17, 129, 270-73, 275-77, 279-80, 304-07, 309-10; Exs. W-11 (p. 11), W-12 (pp. 47-51), W-13 (pp. 5-6, 18-21), W-14 (pp. 3, 16, 18, 21, 32, 106, 119), W-15 (pp. 35-36), W-16 (pp. 58-59), W-25 (pp. 14-15, 23), W-26 (pp. 4, 47), W-27 (pp. 15, 64-65), W-29 (pp. 17-18), W-31 (pp. 36-38), W-38 (pp. 12-13, 17, 63, 99, 104), W-40 (pp. 42-43, 76-77, 107-108), W-45 (p. 15), GX 329 (pp. 111-12), GX 338 (pp. 29-32), GX 339 (pp. 48-49), GX 340 (p. 26), GX 341 (p. 27), GX 345 (pp. 74-75), GX 361 (pp. 15-16), GX 362 (pp. 14-15), GX 363 (pp. 15-16).

disposed of voluminous evidence of this character with nothing more than a reference to the fact that "examples of a particular enterprise *changing* from one alarm method to another are cited in the record" (FF 12-13, 11a) and this *ipse dixit*:

> "* * * [S]*ignificantly,*[19] the preponderant shift is from the less integrated, advanced, expensive, and safe method of proprietary systems to accredited CSPS, thus indicating a customer recognition of a *difference in market.* This difference, to use a popular analogy, could be compared to moving into the class of the rich by changing from a compact six-cylinder car to a chauffeur-driven sedan. That is, there is a major *product difference* far transcending the obvious possible minimum cross-elasticity of demand." (FF 13, 11a; see also FF 35, 18a)

These conclusions cannot withstand even brief scrutiny. First, the evidence casts no light on how frequently users substitute one type of protection system or service for another. There is no evidence that the incidence of shifting is substantial,[20] and without such evidence there is no basis for the lower court's erroneous conclusion that examples of shifting indicate "a customer recognition of *a difference in market.*"

Second, the record wholly fails to show any such "preponderant" shift, upgrading or otherwise, to accredited CSPS. Of the fairly numerous record examples of user changes in protective systems, the great bulk—including

19. Court's emphasis.

20. *I.e.,* that customers, after surveying the alternatives (as even the Government concedes they do) and choosing a protection system, do not tend to stay with that first choice.

those set forth in the Government's evidence—show that any "preponderant shift" is *away from accredited CSPS* to some other protection system.[21]

Third, any conclusion that there is a "difference in market" cannot stand in the face of the marked differences in election between systems by similarly situated establishments. When, for example, "Robert Hall" and "Howard Clothes," operating large chains of competing clothing stores with identical protection problems, after solicitation by both accredited CSPS firms and other protection service companies, not only make different elections between those alternatives but in fact elect differently from one store to another within their respective chains,[22] then the obvious interchangeability and cross-elasticity of demand cannot be ignored, as the court below chose to do.

Finally, the District Court's erroneous equation of a "product difference" or a "business difference" with a difference in "relevant market" in the above finding and throughout the opinion[23] reveals its substitution of the

21. *E.g.*, Tr. 124, 151-54, 163-64, 178-79, 291, 308; Exs. A-41, A-61, A-62, A-70, A-84, A-85, A-95, B-11, B-94-B-95, C-97, D-11, E-3, E-10, F-16, H-5, W-11 (pp. 20, 35-36), W-17 (pp. 89, 117-18), W-21 (p. 20), W-31 (pp. 38-64), W-32 (p. 4), W-33 (p. 304), W-36 (p. 8), W-39 (pp. 35-37).

22. Exs. W-32 (pp. 2-5), W-33 (pp. 2-5).

23. "Many (though by no means all) of those who are engaged in the alarm company business * * * have in correspondence and orally shown that the portion of informed opinion which this Court regards as the more credible recognizes the accredited central station business as a *separate type of business.*" (FF 32, 17a) In fact, more alarm company operators testified to the effective competition between accredited CSPS and other electric systems than failed to do so (see fn. 18, *supra*, p. 23), and often the few who denied such competition in purely conclusory terms nevertheless (1) conceded that similar establishments use different forms of protection or (2) otherwise demonstrated the fact of competition. *E.g.*, Ex. W-6 (pp. 50, 52, 60, 96).

narrow, limited definitions permissible for Clayton Act merger purposes in lieu of the monopolization market tests of *Cellophane*.

The court below concluded, in sweeping generalization but without any specification of its evidentiary basis, that insurance companies allow "a far larger reduction of premium" for accredited CSPS.[24] At the same time, however, it found that the cost of accredited CSPS is "more than for any other types of protection service" (FF 33, 17a), so that it is apparent that any higher service cost must be considered against larger insurance savings. While the evidence does suggest that accredited CSPS costs may in some (but not all[25]) instances exceed those of other protection systems, the record affords insufficient basis for evaluating relative costs in net cash outlay for particular users or others substantially similarly situated. Moreover, the evidence (although minimized and essentially ignored by the District Court) significantly establishes that there is in fact such marked cross-elasticity of demand for accredited CSPS and the other systems as to result in substantial impact upon the prices which can be charged for the former.

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24. Each form of protective system can qualify users for insurance and premium discounts. While discounts accorded accredited CSPS are frequently larger than for some other systems, the difference is relatively small (*e.g.*, 15 compared with 12% and 30 compared with 20%) and in many cases other systems are accorded equal or similar discounts. (*E.g.*, GX 346 (pp. 36, 40-48, 62-63), GX 5 (p. 335), Exs. D-75e (pp. 121, 212, 214-15, 333-35, 417-18, 515, 628-29), W-33 (p. 5), A-89, B-11, B-12, B-19, B-21, B-30, B-92, E-55, GX 337 (pp. 1, 6-7).)

25. The cost of maintaining watchmen may exceed the expense of accredited CSPS, as the Government pointed out.

Thus, not only did competing CSPS witnesses give testimony demonstrating that insurance accreditation for central stations does not place such protective service in a separate market,[26] but the record abounds with evidence of the price interrelationship between accredited CSPS and other systems. For example, in 16 cities where there is no other accredited central station, ADT faced at least 841 competitive solicitations and lost the business in approximately 40% of those instances. In some of these cities, ADT lost almost 67% of such solicitations (*e.g.*, Salt Lake City, San Diego). In order to win business at all, ADT was forced to reduce the prices for its services below its target rates; in 1963 from 18 to 57% of its business in these cities was at reduced rates. Defendants' lack of control over price is further evidenced by the fact that from 1957 through 1963 ADT was forced by competition to reduce its regular rates for accredited CSPS in 24 to 29% of its total solicitations in all cities where it alone offered such service[27] (Exs. F68-80). The record as a whole dem-

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26. Such competing witnesses noted that insurance accreditation for CSPS is not deemed determinative and any difference in net cost to users exists only in some instances and does not control the choice of protective service by all customers. To illustrate:

> "Q. How is it that you are able to sell unapproved service since you are approved and qualify to sell approved service? A. Are you talking about fire, or burglary now?
>
> "Q. Well, take burglary first. A. There again because we are approved only means that we are eligible to install an approved system. The cost is higher, and in a lot of cases the subscriber doesn't want to pay for it. A lot of cases the amount of discount they would save doesn't warrant the additional cost, the expenditures. A lot of cases they can receive their discount without it, a certain percentage of discount. * * *" (GX 337 (pp. 42-44)).

See, also, fn. 18, *supra*, page 23.

27. During this same period ADT was compelled to reduce its regular prices in 35 to 45 percent of its solicitations in cities where there were competing central stations (Ex. F-79).

onstrates effective competition from other protective systems and their very substantial impact upon defendants' supposed monopoly power over prices.

The District Court's disregard for the criteria of *Cellophane* necessarily resulted in a series of glaring and fundamental inconsistencies in its findings. Apart from the inexplicable exclusion even of unaccredited CSPS from the relevant market, the court, for example, found that acquisitions by ADT of protection companies contributed to the asserted dominance of the defendants in the narrow market defined. While conceding that the bulk of those acquisitions (20 of 22) were not shown to be accredited CSPS concerns, the court nonetheless designated them as "competing companies" and "competitive enterprises" (FF 48-51, 21a-23a; CL 6, 27a; OL 10, 30a).

Appellant respectfully submits that the District Court was seriously in error in jettisoning *Cellophane* and substituting Clayton Act market definition standards,[28] there-

28. A colloquy between Judge Wyzanski and Jesse W. Markham, prominent economic consultant and former FTC Chief Economist (who testified that the evidence demonstrated the relevant market could not properly be limited to accredited CSPS), highlights the Judge's belief that this Court will ultimately hold *Cellophane* no longer controlling:

> "The Witness: Are you asking me if in my opinion, just as a horseback opinion, wrapped cigars compete with unwrapped cigars?
>
> "The Court: Yes, don't they?
>
> "The Witness: I would certainly say at the margin they must compete intensely. Whether they compete throughout I am not prepared to say.
>
> "The Court: And the fact that they do compete doesn't mean that you can't have market power with respect to wrapped cigars and the market is the market for wrapped cigars?
>
> "The Witness: Well, I would argue that you would need to modify any statistics that you would build on the basis of

by relieving the Government of its proper burden in proving the relevant market for the measurement of alleged monopoly power. The court's facile acceptance of the Government's mere unsupported allegations produced artificial market share figures for the defendants which simply can not be accepted as demonstrating monopoly power.

Unlike other courts, the District Court here failed to heed the differences (and reasons for those differences) in Sherman and Clayton Act market definition mandated by the decisions of this Court. In *United States* v. *Bethlehem Steel Corporation*, 168 F. Supp. 576, 593-94, n. 36 (S. D. N. Y. 1958), Judge Weinfeld forcefully stated these differences:[29]

"* * * It should be noted that the basic issue in the Cellophane case was that of monopoly power and the Supreme Court expressly limited the market definition

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wrapped cigars. * * * That is, if I have a firm that has 75 percent of the wrapped cigar market, that narrowly defined, but I still find that customers walk to a cigar counter and with reasonable frequency take a look at wrapped and unwrapped cigars, ask their price, find the unwrapped cigar cheaper, and say, 'I will take the unwrapped cigar'—to that extent I would surely argue that the wrapped cigar statistics overstated the dominant firm's position.

"The Court: That is very interesting, because it is quite clear, isn't it, from common experience that what you have described as possibly happening with respect to customers of cigars does happen. There is a very large number of cigar smokers who look when they go into a tobacconist's at both the unwrapped and the wrapped cigars, and you do know, as a matter of fact, the Supreme Court and other tribunals have held that the wrapped cigar market is a market. * * * The Supreme Court would regard any one company that has 36 percent of the textile market as having monopoly power *under Section 1* of the Sherman Act. There is no doubt about that, is there?

"The Witness: *If there were any mergers* attached to its getting to 36 percent, I don't think there would be any question about this whatsoever." (Tr. 667-73, 677)

29. See, also, *Crown Zellerbach Corporation* v. *FTC*, 296 F. 2d 800, 814-815 (9th Cir. 1961), *cert. denied*, 370 U. S. 937 (1962).

there to the monopolization clause of §2 of the Sherman Act. There is a basic distinction between §2 of the Sherman Act and §7 of the Clayton Act. Further, monopoly power was defined by the Supreme Court in the Cellophane case as 'the power to control prices or exclude competition.' Obviously, when the question is power over price, substitute products may be relevant because they can limit that power. The issue under §7 of the Clayton Act is not whether a merger may result in a company having power over price or the power to exclude competition. The issue under §7 is whether there is a reasonable probability of substantial lessening of competition. There can be a substantial lessening of competition with respect to a product whether or not there are reasonably interchangeable substitutes. The merger of two producers of a product may substantially lessen competition or tend to create a monopoly in the market for that product even though it does not substantially lessen competition or tend to create a monopoly in the broader market embracing all the products which are reasonably interchangeable with that product."

If appellant is wrong and (adopting Judge Wyzanski's oft-reiterated "popular analogy") the day has come when the "chauffeur-driven sedan" is to be the relevant market for measuring monopoly power in the automobile industry, then the public interest demands that this Court expressly announce that fact by overruling *Cellophane* so that the nation's economy can face up to the monumental impact of such a decision.

(b) *The Erroneous Percentages Attributed to Defendants.* There is still another area of fatal deficiency in the market shares assigned to defendants by the Government and the District Court as the basis for inferring monopoly

power. It was found that defendants' "share of the total national accredited CSPS market ranged from 87% to 91%" (FF 44, 20a).

These market share data were derived from stipulated figures as to the *total* central station revenues of all accredited CSPS concerns (Stip. 5, GX 312). The figures include revenue both from insurance-accredited or approved and non-accredited or unapproved service provided by those accredited CSPS concerns. To illustrate the problem, *all* of ADT's central station burglar alarm revenues are included but only 39% of ADT's central station burglar alarm systems were approved or "certificated" (Stip. 8). And yet all of the comparable central station revenue of non-accredited central station companies is excluded from the universe on which the market share figures were predicated.[30] Even if the court's erroneous market definition

30. The nature of this total infirmity can be demonstrated by hypothetical figures (since the comparative values are not in the record) in an illustrative table:

	Volume of Business		
	Insurance-Approved or "Certificated" CSPS Revenue	*Other CSPS Revenue*	*Total*
Defendants	80	20	100
Other Accredited CSPS Firms	10	15	25
Non-Accredited CSPS Firms	—	175	175
	90	210	300

Relating these figures to the Government's allegations, adopted without analysis by the court below, defendants were *not* found to have 80/90 of the insurance-approved or "certificated" CSPS revenue. Rather they were found to have 100/125 of the *total* CSPS revenue (both insurance-approved or "certificated" and other) of accredited CSPS concerns alone. Thus the CSPS revenue (not insurance-approved or "certificated" but identical to the "other CSPS revenue" of defendants and other accredited CSPS firms) (175) of non-accredited CSPS firms was excluded. If it were included, in this example defendants would have 100/300 of the total universe embodying all like revenues.

were accepted, it is clear that the court made fundamental errors in calculating what defendants' share of that market was.

(c) *The Geographic Market.* The District Court also ignored the determinative business facts in concluding that the geographic limits of the asserted market were national (*e.g.*, FF, 37, 18a), while nonetheless conceding the existence of "local or city markets" which "in other litigation might be found in themselves to constitute, for purposes of the antitrust laws, definable, separate markets * * *"[31] (FF 38, 18a). The rationalization stated for the conclusion that accredited CSPS is a national market is the admitted fact that defendants, particularly ADT, operate such systems in more than one city[32] (but not nationally). The fact that ADT so operates, however, clearly does not make the relevant market national, particularly when, as the court itself found (FF 10-11, 10a-11a), the bulk of the accredited CSPS concerns operate in only one city or locality. In short, the lower court was inadvertently confused by the fact that ADT is allegedly engaged in interstate commerce, concluding from its findings to that effect that the market was "interstate" or national.

Undisputed facts, accepted by both sides and adopted in substantial part by the lower court, inevitably point to

31. *Cf. United States* v. *Griffith,* 334 U. S. 100 (1948) and *Schine Chain Theatres, Inc.* v. *United States,* 334 U. S. 110 (1948), where in circumstances analogous to those here local areas were deemed the proper spatial concept for relevant market determination in Sherman Section 2 proceedings.

32. "* * * [B]ecause of the * * * patterns in which that industry has developed, the market has a national interstate-commerce character. * * * The existence of a national market is underlined by defendants' own national pattern of business. * * *" (FF 37, 39, 18a).

the conclusion that the CSPS business (both accredited and non-accredited) is local and competition and "market shares" can be measured only at that level.

CSPS can be rendered only within an area of up to approximately 25 miles of the central station. Employees must be able to reach the scene of an alarm promptly. High leased-line costs make it prohibitively expensive to connect with user premises and transmit signals over greater distances. Maintenance and operation of a central station require sufficient customer concentration to yield certain minimum revenue, conceded by the Government to be at least $125,000 annually[33] (FF 3-4, 8a-9a). As the words of the complaint sum up, "Extension of [CSPS] to subscribers located outside of a certain radius is not practicable" (Compl., par. 11).

Central stations are approved or accredited only on a single, station-by-station basis. Moreover, central stations in their daily operations are physically independent of any other station (FF 4, 9a), and there has been no showing of any significant competitive advantage or controlling market determinant attributable to one firm's operation of stations in more than one locality.

Finally, appellant submits that other salient findings of the court below demonstrate the local character of the

33. Yet the Government included revenue from "natural monopoly" areas (where by its own definition not more than one central station could be sustained) in its erroneous market share figures, adopted by the District Court. The existence of such "natural monopoly" areas, attributable to the fact that many localities cannot support more than one central station explains why in many cities ADT or its competitors have no central station competition.

competitive arena in which market power must be determined. In finding 11 (11a), the court determined whether or not non-defendant accredited CSPS concerns had competition in terms of whether or not there were other CSPS firms in the same city. And in findings 46 and 47 (20a-21a), the court recognized that the price levels for CSPS vary from one city or locality to another.[34]

3. The decision of the District Court is fatally undermined by numerous other findings of fact and conclusions which are clearly erroneous.

As previously set forth, the complaint charged an over-all conspiracy to restrain trade and to monopolize based upon an alleged agreement, *inter alia,* to divide types and areas of service, to acquire accredited CSPS firms and to engage in predatory pricing to destroy competition. The District Court concluded that ADT, AFA and Holmes engaged in such restraints of trade in violation of Section 1 of the Sherman Act and that they were a means by which these companies conspired to, and did, monopolize in violation of Section 2 of the Act (CL 1-6, 26a-27a).

The record does not support any such conclusion of over-all conspiracy, and the court below made no support-

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34. Indeed, the Government itself focused upon the local nature of the relevant market (*e.g.,* "the geographic area in which the defendants' power shall be measured must be limited to those cities, throughout the entire United States, which are of sufficient size to support an approved central station protection service operation"—Trial Brief, p. 174) and sought relief in the form of divestiture of assets by ADT to the extent "necessary to assure competition in central station electric protection service *on the local level.*" (Compl., Prayer, par. 4).

ing findings of fact to that effect. There is no evidence that any of the defendants' acquisitions or allegedly predatory pricing were other than purely unilateral and independent of the others. Even as to the agreements, dating back to 1907 and earlier, allegedly allocating geographic markets and classes of customers, not all of the defendants were parties to any one of those agreements (*e.g.*, one involved ADT and Holmes, the other ADT and AFA), and the agreements were not shown to be in contemplation of each other or part of any unitary "grand design" (FF 51-53, 23a-25a).

Similarly, there is no proper record support for, and the evidence is directly contrary to, the District Court's findings and conclusions that Grinnell has controlled direction of the policies of ADT, AFA and Holmes[35] (FF 21-24, 26, 14a-16a; CL 7, 27a) since its acquisitions of their stock commencing only in 1949 (Tr. 507, 727-29, 732-33; GRJ 65-66). Any such findings fail to prop up the insupportable conclusion as to the existence of a "monopolistic combination."

Moreover, there is neither evidentiary nor logical support for the lower court's conclusion that ADT's admitted operation for a period of time of 20 deficit stations

35. Illustrative of the factual errors permeating the District Court's findings is the following: "In only one instance that Mr. Fleming [Grinnell's president and ADT's Chairman] could recall, has a board of directors of one of the affiliated defendants ever vetoed, or rescinded or overridden any of his or Grinnell's management proposals or plans" (FF 23, 15a). The cited testimony was directly to the contrary, *i.e.*, that in only one instance had any alarm company management position been overridden by its directors. (Tr. 734-35)

Mr. Fleming testified without challenge,

> "* * * I do not take any part whatsoever in the management of any of those companies. I don't know the central station business, your Honor." (Tr. 733).

in cities where there was no other central station "conclusively proves that defendants enjoy national monopolistic power which permits one of the conspirators to occupy local markets where no independent CSPS station would long function and to extend to each of them the combination's national monopolistic control" [36] (FF 47, 21a). For the purposes of this statement, it suffices to point out that a concern operating in many cities with only a minor and clearly non-monopoly percentage of total revenue there or nationally might support deficit operations in some cities, even for a substantial period of time. And significantly, the court drew this erroneous conclusion in the context of cities where it apparently concluded that the available subscriber base was insufficient to support an "independent CSPS station", so that by definition there could have been no predatory conduct aimed at such competition.[37]

Again, to the extent that the court's finding 55 (25a-26a) and the conclusion it purports to support (CL 4, 27a) imply that ADT or any other defendant has regularly departed from its established prices to forestall competition, the record will not sustain any such conclusion. Indeed, the finding's labelling of deviations as "occasional," "infrequent," "rare" and "at least once" demonstrate in part

36. To the contrary, the fact of deficit operation in such cities tends only to confirm the fact of substantial cross-elasticity of demand and interchangeability with other protective systems, underscoring the error of the Government and the District Court in artificially limiting their definition of the relevant market.

37. Indeed, such deficit operation is consistent with the commencement of central station service. Witnesses for other CSPS firms testified that, even in the absence of CSPS competition, they did not break even on such service for 20, 7 and 12 years, respectively, after starting them in Tulsa, Honolulu and Phoenix. (GX 359 (pp. 14-15), GX 361 (p. 19), GX 363 (p. 22).)

the character of the evidence. Omitted, however, are such considerations as the fact that ADT's reiterated policy was one of never beating, but at most only meeting, competitive offerings. (*E.g.*, Tr. 187-89, 282-83, 313-14, 579-80, 597.)

Also without factual or logical support is the finding that when ADT dismantled an acquired central station in 1955, following failure of the Department of Justice to object when clearance was sought, it revealed "in the most flagrant way its intent to attempt to monopolize" (FF 49, 22a). The unchallenged evidence was that the station in question was in substantial disrepair and deterioration (Tr. 427-37). But even more importantly, in a business where the Government concedes the necessity of minimum bases of subscriber revenue to sustain a central station, the fact that upon acquiring another station its subscriber circuits are added to an existing station falls far short of manifesting intent to monopolize.

As final examples of the numerous clearly erroneous findings, ADT points to those in which the District Court found that the asserted position of ADT and the other defendants in the defined relevant market resulted from restraints of trade (including price deviations by a "monopolistic combination") and acquisitions manifesting alleged attempts to monopolize, a conspiracy to monopolize and achieved monopolization (FF 48-55, 21a-26a; CL 1-6, 26a-27a). Even if the relevant market designated and defendants' percentages thereof were not erroneous, and even if the court below had in fact relied upon findings as to asserted restraints of trade and acquisitions (as we believe

the court's decision demonstrates it did not) rather than placing the burden upon defendants to prove they had not monopolized, there is no showing of the requisite causal connection between the challenged acts and the asserted position of defendants.

To illustrate, the District Court's own findings by implication reflect the record fact that only two of ADT's 22 acquisitions dating back to the early 1900's were within the market as defined by the Government and the court (*cf.* FF 48-50, 21a-22a). Again, concerning the allegedly predatory pricing, the District Court's findings point up the infrequent and inconsequential nature of any deviations.[38] Finally, the lapsed agreements challenged as allocating areas and customers between the alarm company defendants are in no way shown to have affected third parties or their competition with the defendants and there is no other basis for concluding that such agreements were the foundation of defendants' alleged monopoly power.

4. The District Court entered a decree which merely repeats language of Sections 1 and 2 of the Sherman Act: defendants are "enjoined from further restraining trade, or attempting or combining to restrain trade, in that designated market and from further attempting to monopolize, or conspiring to monopolize, or monopolizing that designated market" (36a).

38. See FF 55 (25a-26a) and compare with the facts set forth in findings 44 and 45 (20a) which show that no prospective entrant has been unable to begin operations (in fact, the number of CSPS concerns has grown manyfold), no CSPS firm has failed or been driven out of business, and defendants' shares of revenue and subscribers have been declining.

In marked contrast, Rule 65(d) of the Federal Rules of Civil Procedure requires that every injunction entered by a District Court "shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; * * *" The Rule is derived from Section 19 of the Clayton Act, and, of course, is applicable to antitrust actions.

The principles behind the prohibition of such sweeping injunctions have long been made clear by this Court. In *Swift & Company* v. *United States,* 196 U. S. 375 (1905), Mr. Justice Holmes stated:

> "* * * we equally are bound *by the first principles of justice* not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. *We cannot issue a general injunction against all possible breaches of the law.*" (196 U. S. at 396)

In ordering the general words "or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid," to be stricken from the injunction he stated:

> "The defendants ought to be informed as accurately as the case permits what they are forbidden to do. Specific devices are mentioned in the bill, and they stand prohibited. The words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning that it was our duty to avoid." (*id.* at 401)

More recently, in *Schine Chain Theatres, Inc.* v. *United States,* 334 U. S. 110 (1948), this Court struck down a de-

cree which enjoined defendants from "monopolizing" first and second-run films, stating:

> "* * * The statutory requirement is that these injunctions 'shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained' * * * [W]e think the public interest requires that a more specific decree be entered on this phase of the case. The precise practices found to have violated the act should be specifically enjoined."[39] (334 U. S. at 125-126)

In *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426 (1941), this Court ordered modification of a cease and desist order which was couched in statutory language, and which did not specify the particular practices to be avoided, stating:

> "A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. *But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.* This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus dissociated from those which a defendant has committed." (312 U. S. at 435-36)

39. See, also, *United States* v. *First National Pictures, Inc.*, 51 F. 2d 552, 554 (S. D. N. Y. 1931).

These principles set down by this Court and Rule 65(d) are applicable to this case. It is in the public interest that the District Court's patent disregard of such basic and long-standing rules be corrected. This error of the court below is compounded by the fact that the court's failure to rule upon evidentiary objections and to make adequate findings as to what agreements or acts (other than the alarm company agreements of 1907 and earlier), if any, were deemed unlawful leaves defendants without knowledge as to what the decree proscribes.

Paragraph Four of the final decree provides that none of the defendants "shall, after April 1, 1966, continue to employ or employ, James Douglas Fleming as officer, director, employee, consultant, agent or otherwise" (36a-37a). Mr. Fleming, who is the president of Grinnell and chairman of defendant, ADT, was not himself a defendant in this action. To the best of our knowledge this drastic remedy is entirely unprecedented,[40] and we submit that it is unwarranted.

It is clear beyond doubt that a proper injunction restraining corporate defendants from specific violations of the antitrust law is sufficient to bind the present and future officers, agents and employees of those defendants. *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 428 (1945). It can not be presumed that Mr. Fleming would disregard the final decree of the District Court any more than such a presumption would be proper in regard to any defendant in any case. Nor can it be presumed that the District

40. Cases under Section 8 of the Clayton Act, prohibiting interlocking directorates in competing organization, are, of course, distinguishable precedents.

Court would be powerless to act in the event Mr. Fleming were to transgress the terms of the order. Thus, even if in fact Mr. Fleming should attempt to frustrate the orders of the District Court, the public interest could be protected by swift and effective contempt proceedings.

In the present case, the court did not find that Mr. Fleming had committed any personal wrong or had sought any personal gain (the record is barren of any evidence of wrongdoing by Mr. Fleming). Indeed, Judge Wyzanski specifically stated that the decree should "not be regarded as directed against Mr. Fleming, but against defendants' use of Mr. Fleming" (OR 6, 34a). In light of this ingenuous statement, it is clear that if a decree were to be entered at all one directed solely against the corporate defendants would have been sufficient to protect the public interest, and that Paragraph Four of the present decree is improper.

Conclusion

The questions presented by this appeal are substantial and of public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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